UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF NEBRASKA, et al.,	
Plaintiffs,	
v.	No. 4:22-CV-01040 HEA
JOSEPH R. BIDEN, JR. In His Official Capacity As the President of the United States of America, et al.,	
Defendants.	

PRELIMINARY INJUNCTION HEARING

BEFORE THE HONORABLE HENRY E. AUTREY
UNITED STATES DISTRICT JUDGE

OCTOBER 12, 2022

APPEARANCES:

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U.S. DEPARTMENT OF JUSTICE - CIVIL DIV.

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PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

(PROCEEDINGS STARTED AT 10:30 A.M.)

THE COURT: Good morning, everybody. This is the matter of State of Nebraska, State of Missouri, State of Arkansas, State of Iowa, State of Kansas, and State of South Carolina, plaintiffs, versus Joseph R. Biden, Jr. in his official capacity as President of the United States of America, Miguel Cardona in his official capacity as Secretary, United States Department of Education, and the United States Department of Education, defendants, embodied in case number 4:22-CV-01040. The matter is before the Court on this date for purposes of proceeding on a hearing for a preliminary injunction in the matter sought by the plaintiffs against the defendants.

Plaintiffs are present through counsel; defendants are present through counsel. For the record, we are also broadcasting, if you will, consistent with the authority issued in the pilot program that allows for the audio broadcast of certain civil proceedings of interest and importance to the public.

Counsel for plaintiffs, are you ready to proceed?

MR. CAMPBELL: We are, Your Honor.

THE COURT: All right. For the record, would you introduce yourselves in that regard.

MR. CAMPBELL: Sure, Your Honor. James Campbell on behalf of plaintiff states. I'm with the Nebraska Attorney

General's Office. I have two colleagues with me.

MR. TALENT: Michael Talent, Deputy Solicitor General for the State of Missouri.

MR. SAUER: And John Sauer, Solicitor General for the State of Missouri.

THE COURT: And are you all going to be engaged in presenting and arguing the matter today or will it just be Mr. Campbell?

MR. CAMPBELL: It will just be me, Your Honor.

THE COURT: All right. Counsel for defendants, would you introduce yourselves for the record.

MR. NETTER: Yes, Your Honor. Good morning. Brian Netter, U.S. Department of Justice, for the defendants. I am joined by two colleagues, who I will let introduce themselves.

MR. KNAPP: Good morning, Your Honor. Cody Knapp with the Department of Justice.

MR. REBO: Good morning. Samuel Rebo with the Department of Justice.

THE COURT: Now, Mr. Rebo, before we started, I was informed by the clerk that you had not entered as of yet but you were in the process of doing so.

MR. REBO: That's correct, Your Honor.

THE COURT: Has that process been completed? Are you now entered as a matter of record?

MR. REBO: I'm in the process of doing that, Your

Honor. I don't think it's been completed yet.

THE COURT: All right. What does that mean, that you are in the process of doing that?

MR. REBO: That means that I'm trying to get the credentials to -- I created an account on PACER recently, Your Honor, and I am waiting for from my side the Department of Justice to approve that, at which point I'm going to be entering an appearance in this case.

THE COURT: All right. That having been said then, you will not be presenting or arguing anything today?

MR. REBO: That's correct, Your Honor.

THE COURT: All right. And, Mr. Netter, you will be arguing on behalf of the defendants?

MR. NETTER: Yes, Your Honor.

THE COURT: All right. Before we begin, are there any preliminary matters that we need to take up with reference to argument?

MR. CAMPBELL: I don't believe so, Your Honor.

THE COURT: All right. Well, as they say, let's get at it.

MR. CAMPBELL: Your Honor, two questions. Would you prefer argument from up there?

THE COURT: Please.

MR. CAMPBELL: And then the second question is, would you like me to keep the mask on for the argument or take it

off?

THE COURT: You can remove it for purposes of arguing.

Proceed.

MR. CAMPBELL: The defendants' Mass Debt Cancellation is an extravagant assertion of agency power. It will erase almost a half trillion of the outstanding 1.6 trillion in student loans, and in the process, it will eliminate all outstanding loans for approximately 20 million --

THE COURT: Okay, and before we get into that type of argument, can we have some background as to what the facts are that arguably create a basis for your seeking relief.

MR. CAMPBELL: Sure. So, Your Honor, would you like facts about the program and about the plaintiffs and how they are impacted by it? Are those the facts that you would prefer?

THE COURT: Briefly.

MR. CAMPBELL: Okay. So the program has a couple central eligibility requirements. The program purports to eliminate a significant amount of student loan debt. The first requirement is that someone has to have a direct loan held by the federal government or what's called a FFEL loan held by the federal government and I believe also maybe a Perkins loan held by the federal government, although that is not relevant for purposes of our claims. And then the next

requirement is that the individual not have earned more -- if they are filing as an individual, filing taxes, not have earned more than $125,000 per year or if they are filing as a married individual, as a household, not earned more than $250,000 a year. So those are the essential eligibility facts.

And in terms of the relief provided under this, the cancellation that is given, it's either 10,000 if the borrower did not receive a Pell Grant or 20,000 if the borrower did receive a Pell Grant. That's essentially the --

THE COURT: So is it an automatic 10,000 or 20,000 or is it dependent? Is 10,000 the maximum that can be granted or does everybody who applies and their application is accepted automatically get $10,000 taken off?

MR. CAMPBELL: As long as they have at least $10,000 in loans still outstanding, yes, they do.

THE COURT: Okay. So at least 10,000. If you have 30,000 in loans, you still only get 10,000 taken off; correct?

MR. CAMPBELL: Correct, unless you received a Pell Grant, in which case you would get the 20.

THE COURT: Exactly. Okay. Go ahead.

MR. CAMPBELL: So this program impacts the plaintiff states in a number of ways, and I will start with the facts regarding those. The first is Missouri's interest and harms through MOHELA. MOHELA is the Missouri Higher Education Loan

Authority. It is a state entity. It's described in state law as a public instrumentality. It is charged with the, quote, essential public function, end quote, of providing loans for students in the state and also for supporting educational institutions in the state. So that entity is affected in a number of ways. I will highlight just one in particular. First is that they are a provider -- or I should say a servicer of direct federal loans, meaning that they are one of the nine entities that are charged with servicing direct federal loans; therefore, they are going to be one of the entities that is directly involved in effectuating the cancellation.

Now, they are harmed in a number of ways as I said, but I think the most straightforward is this. We indicated in the reply brief we filed yesterday that in their most recent fiscal year, they earned $89 million in revenue from servicing federal loans, and that revenue is a function of the number of accounts that they service. So what this program is going to do is it's going to cancel roughly half of the outstanding accounts, and that's by defendants' own admission. They recognized that about half of eligible -- I think they say about 45 percent of eligible borrowers will have all of their loans eliminated under this.

THE COURT: So where does that $89 million go? Where did it go? Who gets it? What happens to it?

MR. CAMPBELL: So it goes into MOHELA's funds, and part of it obviously covers expenses, and whatever is left can be used to do what the statute requires it to do, which is provide loans to students and to support higher education in the state.

THE COURT: So the $89 million in revenue is used to provide student loans or some of it is used to provide loans to students?

MR. CAMPBELL: Some of it is. And the support for that is in the financial statement for fiscal year 2022 that we cited in the reply brief yesterday. There is a discussion of how MOHELA originated approximately $4 million in loans last year, and so that is funded by the money that they otherwise generate.

So those are the harms -- at least one key harm as to MOHELA. Focusing now on the tax harms that we allege, there are a number of states, specifically we've highlighted four, Nebraska, Iowa, South Carolina, and Kansas, who all suffer direct tax harm from this program. The way that goes is that they currently do not tax student loan debt discharge, but they are set to start doing that at the end of 2025. So by this cancellation forcing all of this massive amount of discharge into the present time, they are depriving the states of the ability to tax it once their laws are indicating that they will start doing that. So that is a present harm because

there right now is a pool, as I said at the outset, of $1.6 trillion in outstanding student loan debt, and a significant amount of that, nearly a half trillion, is going to be eliminated very soon as a result of this program. As a result of that, that's going to take away the massive pool that is available for the states to tax and it's going to cause them a direct tax harm.

Then the last set of harms --

THE COURT: So are there other types of federal government action in the past or currently pending that could impact or impair a state or a number of states' ability to collect, maintain, or increase their collection of tax revenue?

MR. CAMPBELL: Your Honor, there might be. I'm not familiar, but this is what we have identified as a direct harm because it's taking an existing pool --

THE COURT: So when you say "direct harm", are you saying injury in fact?

MR. CAMPBELL: I am saying injury in fact, and I am also identifying that it is traceable to the action.

THE COURT: So the impairment -- the federal government's action that might impair collection of taxes by a state is a direct injury. Is that what you are saying?

MR. CAMPBELL: Yes, it is, Your Honor.

THE COURT: And your authority for that is?

MR. CAMPBELL: *Wyoming versus Oklahoma*, which is a U.S. Supreme Court decision that we cited in both our opening brief as well as in our reply brief.

THE COURT: And that's what *Wyoming* says, that the impairment of a state's ability to collect or impose taxes is an injury in fact?

MR. CAMPBELL: More precisely it says that an injury that directly reduces the taxes that they are going to recover is an injury in fact. And so the defendants respond and they say, well, you could change your law to avoid this problem. That's one of their main responses to the tax harm. But as we indicated in the brief we filed yesterday and the Fifth Circuit took this position in the Texas *DAPA* case that forcing a state to change its laws is itself an injury. So the defendants can't avoid the injury here by simply forcing the states to engage in another one.

Moving now to the last set of harms -- well, maybe it's not the last, but the next set of harms is what we have called the consolidation harms. The consolidation harms are the harms that result to plaintiff states because of the programs incentivizing the consolidation of non-federally held FFEL loans. So this argument takes a little background to unpack. The first point that I would highlight is the difference between two different kinds of FFEL loans. There are FFEL loans that are held by the federal government, and

there are FFEL loans that are held by non-federal entities. So what the defendants initially did in announcing this program is they indicated that if you had one of these non-federally held FFEL loans, that you could consolidate it into a direct loan in order to become eligible, and that not surprisingly prompted widespread consolidation, and that consolidation harmed the plaintiff states in a number of ways. I will highlight two of them.

The first is to Missouri and to Arkansas, specifically through their agencies MOHELA and then ASLA is the name of the Arkansas agency. That's the Arkansas Student Loan Authority. They both are holders of these privately held FFEL loans. So by holding those loans, they generate income and they also help to secure bonds and notes from the FFEL loans that they hold, but now those FFEL loans are being consolidated, which means they are being eliminated, and as a result, they are being adversely affected by it. Specifically in the Williams declaration that we filed in support of our motion, he indicates that the State of Arkansas has lost roughly 5 to $6 million through the consolidation of FFEL loans.

And then the other set of injuries that fall under the consolidation rubric would be that to the State of Nebraska. The State of Nebraska invests in securities that are backed by these FFEL loans. And so by investing in those,

they are seeking to profit off the long-term interest payments that are generated by those loans, but what this program does by incentivizing the consolidation is it cuts off that ongoing income stream, retires the investment early, and prevents the State of Nebraska from receiving the interest that it had bargained for as part of buying that security.

So the federal government's response to this argument is that they now allegedly changed the program they say, and so this incentive to consolidate no longer exists. Now, the details of this change can be found in an alteration to their website on December (sic) 29th. On December (sic) 29th, they changed the language on their website that said you can consolidate these non-federally held FFEL loans in order to make them eligible as a direct loan and they changed it and they said instead that only if you filed an application to consolidate before September 29th were you eligible and those that might file a consolidation application after that date are not.

There is a couple responses to why that doesn't eliminate our harms. The first response is that that change in the program was unauthorized by the Secretary's authorization of the waiver. So if you look at the document they filed, which is signed by the Secretary giving authorization for the waiver, it says that -- and this is document 27-1. It's one of the exhibits attached there. It

says that there are a number of loans eligible for this, and one of them is direct federal loans. Once the consolidation occurs, what's left is a direct federal loan, so they can't carve this consolidation pathway out of the program because doing that would be outside the authority that the Secretary has given them. So our argument is that that attempt to close the consolidation pathway is unauthorized and, therefore, the incentive to consolidation still exists.

But in addition to that, we also argue that even if they did close the consolidation pathway for now, there are at least two reasons why we still have standing and why we are still suffering ongoing injuries. The first point is that the defendants argue -- oh, I'm sorry, is that consolidation takes time. That's the first point, consolidation takes time. So anything that started before September 29th, that consolidation still may not be done. So if this Court were to enter an injunction now and if that injunction were in part to put a pause on those ongoing consolidations, then that would help to remedy the ongoing harms that the states are experiencing.

In addition, there is -- particularly considering the amount of authority that the defendants think they have under the HEROES Act, there is nothing stopping them if they are right on the scope of their authority from telling people that they can once again engage in this consolidation, and because

we know that voluntary cessation of unlawful activity is not enough to moot a case, that simply doesn't work to wipe out all of the plaintiffs' injuries. We still have those injuries. The defendants could change their policy back again, and we should be allowed to vindicate those injuries in court.

So, Your Honor, that gives you the facts and a discussion of a lot of the standing issues, the injury issues, the irreparable harm issues. The last point I would highlight -- well, first, all of those harms I discussed are irreparable. We have explained that in our briefing, but just to highlight a few points. On the MOHELA harms, the money that they lose from servicing these loans, there is no way to get that money back. Once the loans are cancelled, once their number of accounts shrink, thereby shrinking their income, that money is gone. You can't sue the federal government for damages as we know because of the Doctrine of Sovereign Immunity, so that is an irreparable harm.

Similarly, the other injuries that I talked about, the consolidation harms, once these loans have been consolidated, there is no way to fully remedy all of the harms. Now, admittedly we argue in our brief and we think it's true that there is a way for the Court on a permanent injunction to provide us some measure of relief for those consolidation harms, but I don't think they can be fully

redressed once the debt is -- once the loan is consolidated, and, therefore, the injury is irreparable.

So what the defendants have done here -- turning now to the merits unless the Court has any further questions on standing and irreparable harm.

THE COURT: I do have questions on standing.

MR. CAMPBELL: You do?

THE COURT: Yes. The parties in the case are the President of the United States as well as the Secretary and the Department, so let's talk about standing in relation to the President. You know, factually as you have outlined here in open court and in the pleadings, you have set up the ingredients for a cake -- let's call it the ingredients for a cake -- but it's kind of hard to make a cake if you don't have a pan to put the cake in, and that pan for me is standing, okay? So it doesn't matter if you've got all the ingredients. It doesn't matter if they are all fresh and tasty and they are all laid out and you have prepped everything and the oven is nice and hot and it's ready to go and your guests are coming shortly and you need to have that cake all done for them to enjoy. If you don't have a pan or if you don't have the right pan after you have mixed all those ingredients, you can't make that cake, and your guests are going to show up and they are going to be unhappy, they are going to be dissatisfied, they might even be angry because they are all coming to eat some

cake, okay?

Standing is that cake. So what's the standing? What's the President cake pan?

MR. CAMPBELL: Your Honor, are you referring specifically to against the President, standing against the President?

THE COURT: Uh-huh.

MR. CAMPBELL: Your Honor, the reason we included the President in this case is because he was the one that first made the announcement of this program, and at the time we filed the lawsuit, all we had were press releases and announcements. Now in light of the federal government's filings as well as some things that they have done in the last few days that I would love to discuss when I get to the merits, we have a lot more than that. It's very clear that we have final agency action and that the Administration, specifically the Department and the Secretary, are moving forward with this. So while we included the President initially out of an abundance of caution, I don't think whether we have standing against the President ultimately matters so long as we have standing against the Department and the Secretary, which we do.

THE COURT: So is that the same as conceding or confessing that you don't have standing against the President because that's what it sounds like you are saying because thus

far the only thing that you have said with regard to having the President of the United States as a party in this lawsuit is that the President made an announcement.

MR. CAMPBELL: Your Honor, yes, the President --

THE COURT: I know he made an announcement. Everybody that watches the news knows he made an announcement or read a newspaper or watched CNN or, I don't know, maybe even watched The View if that's your thing, not mine. But is the President making an announcement sufficient to give you standing to bring the President in as a party to the lawsuit, any lawsuit, but in particular this lawsuit?

MR. CAMPBELL: Your Honor, we thought it was when the only actions we had were announcements, press releases, and websites.

THE COURT: Okay. You thought it was. So now do you think it isn't?

MR. CAMPBELL: No, I continue to think it's enough for purposes of --

THE COURT: Okay. So if you think you have enough standing to bring the President in to sue the President, tell me what that is.

MR. CAMPBELL: So, Your Honor, this would not fall under --

THE COURT: Beyond the President made an announcement.

MR. CAMPBELL: This would not fall under our APA claim. We do not have standing to sue the President under the APA, but this would --

THE COURT: Yeah, that's true, thank you.

MR. CAMPBELL: But this would fall we believe under our direct constitutional, the ultra vires separation of powers claim we're raising.

THE COURT: So articulate that for me please.

MR. CAMPBELL: Because we're ultimately challenging this Mass Debt Cancellation, and the consolidation at best we can tell originated with the directive from the President to the Secretary to the Department, and so we are suing everyone involved in that chain. But again, Your Honor, I would just stress even if the Court thinks we don't have standing against the President, we do have standing against the other two defendants, and I think that that's what's key here.

THE COURT: So again I'm asking, are you now conceding and admitting that you do not have standing against the President?

MR. CAMPBELL: Your Honor, I'm not.

THE COURT: Because here's the deal, okay? Either you do or you don't. Standing is not like, well, maybe we do, maybe we don't, we'll see later on if we do. No, that's something that we need to address upfront because it is some immediacy. Whether it is the President of the United States

or John Q. Citizen, if they shouldn't be in the lawsuit at the outset, then they shouldn't be in the lawsuit because nobody wants to be challenged with defending something that they should not rightfully be involved in. That's how that law stuff works; right? Okay? Okay. And pragmatically, it increases the burden on the plaintiff as the plaintiff may go forward if the plaintiff goes forward and it imposes an unnecessary burden on the defendant who may not necessarily and should not be involved in the lawsuit from the beginning.

So let me ask you again and preface this by saying that when a lawyer tells me if the President or the party isn't or should not be involved in the lawsuit, then we have claims against other parties, all right, that's tantamount to me as that lawyer saying, okay, Judge, we agree, that party should not be in the lawsuit. So I'm asking you, should the President be in the lawsuit standing-wise or should the President not be in the lawsuit standing-wise? If the President should not be in the lawsuit standing-wise, then let's get that out of the way and move forward with those individual defendants that are properly before the Court because you do, in fact, have standing to pursue claims against them because otherwise, we muddle things up and we waste time talking about parties that we shouldn't be talking about. I'm a pragmatist in that regard, but it also has some considerable legal standing, no pun intended.

MR. CAMPBELL: Sure. Your Honor, on that point, we will readily concede that there is no standing against the President under the APA.

THE COURT: All right. Having conceded that, then on that issue, the President is out on the APA?

MR. CAMPBELL: That's correct.

THE COURT: Okay. Go ahead.

MR. CAMPBELL: However, we do still think that there is standing for that direct constitutional claim.

THE COURT: All right. And I am still waiting to hear more about that.

MR. CAMPBELL: Sure. So to unpack that, standing has three requirements. There is the injury requirement, the causation requirement, and the redressability requirement. We believe that again when we filed this lawsuit, all we had were press releases and announcements, and all of that came and originated from the President, so filing a lawsuit including the President we believed was a legitimate argument because if we could get an injunction, then that would stop all of the harm from happening. So that's our argument on that point, Your Honor.

THE COURT: Okay.

MR. CAMPBELL: Moving now to the merits, one of the points that I would like to emphasize right at the outset is that this is a massive use of federal agency power; as I said

at the beginning, roughly a half a trillion dollars of the outstanding $1.6 trillion in student loans. I think it's also important to know that the agency is trying to do this despite the fact that Congress has repeatedly rejected bills that would have achieved this same goal. So the defendants here are just not content to leave this in Congress's own hands. What they are trying to do is go around Congress, and this they can't do.

They claim that they have authority under the HEROES Act, but the HEROES Act is a statute that gives specific authority to help specific people that are facing harms from a national emergency. It does not allow the Administration to use that statute in response to the end of a national emergency to benefit practically every borrower in the country. The defendants have kept this program shrouded in secrecy for over a month, but as more details emerge, the unlawfulness of this program becomes more apparent every day. And I would like to highlight a few of the recent developments showing that.

First is on Friday, the defendants filed their Rationale Memo that attempted to explain why they have authority to do this, but all that memo does is show the arbitrariness of their actions, and I will highlight one example in particular. We have explained more in the brief, but the first example is there is nothing in that Rationale

Memo that says anything about considering reasonable alternatives. However, the U.S. Supreme Court made it clear in the Board of Regents case that it is incumbent upon an agency when making a change like this to consider reasonable alternatives. There are a number of reasonable alternatives that were available. The Department could have decided to continue the forbearance that it currently has on student loan payments and interest accrual or it could have decided to extend or enlarge the repayment period and then reamortize the loans which would have been a way to bring down the ongoing monthly payments, and the ongoing monthly payments are one of the key points that the defendants rely on to justify this program. But it's not just that Rationale Memo that shows the arbitrariness and unlawfulness here. It's also an OMB application --

THE COURT: Would the defendants have been satisfied with one of those other options, any/or?

MR. CAMPBELL: I don't know, Your Honor, because they didn't even consider them, so I'm assuming that they wouldn't have been.

THE COURT: Not my question.

MR. CAMPBELL: I'm assuming that they wouldn't have been.

THE COURT: It has nothing to do with whether they would have considered it. My question is, would the

defendants have been satisfied with one of those other options since the crux, the gravamen, of the problem here is the debt cancellation issue?

MR. CAMPBELL: I think it's very safe to assume they would not have been okay with a different option.

THE COURT: But in short, no options would have been satisfactory to the defendants.

MR. CAMPBELL: I think that's true because --

THE COURT: Very interesting. Go ahead.

MR. CAMPBELL: Because they were dead set on Mass Debt Cancellation.

THE COURT: That's not my question. You are avoiding my question.

MR. CAMPBELL: I'm sorry, Your Honor.

THE COURT: If they chose one of the other options, they would not have been dead set on mass debt collection as indicated by your statement just now. So if that's the case, if they, in fact, would have chosen one of the other options and had not been set on mass debt collection, then the question is would the defendants have been satisfied then with the exercise of one of the other options?

MR. CAMPBELL: I don't believe they would have been.

THE COURT: Okay. So then the defendants would have been diametrically opposed to anything that would relate to the relief of any debt, which might suggest then that the

defendants might also be opposed to forbearance because of the emergency that was announced during the pandemic and the forbearance that the Secretary granted during the pandemic at the height of the pandemic and the extension of that, which now is extended up to what, December of this year, the initial forbearance and announcement of forbearance and hope for a forbearance and order regarding same that launched the action of the Secretary by the predecessor to President Biden, President Trump. So then are the defendants unsatisfied, dissatisfied, and feel that the action of the forbearance is also ultra vires, is also illegal, and is also against the spirit and letter of the HEROES Act?

MR. CAMPBELL: Your Honor, you asked if the defendants would be against that. Did you mean the plaintiffs?

THE COURT: I meant the plaintiffs, yeah.

MR. CAMPBELL: No, the plaintiffs are not challenging the forbearance.

THE COURT: And when I said defendants earlier, I meant plaintiffs, too. Would the plaintiffs be satisfied with any other options?

MR. CAMPBELL: Your Honor, the plaintiffs would be satisfied with any other option -- with some other options. I am not saying any other options.

THE COURT: Other options as indicated.

MR. CAMPBELL: Yeah, there are certain options --

THE COURT: And I think you referenced those in your documents that you filed.

MR. CAMPBELL: Yes.

THE COURT: Your writings.

MR. CAMPBELL: Yes, we reference a number of alternatives, not conceding that we as the plaintiffs would have been okay with all of the alternatives in the brief, but we would have been okay with continued forbearance, for example, because that would have been a non-agency action. It wouldn't have even been something we could challenge.

THE COURT: Right. Okay. So let me -- if I confuse defendants and plaintiffs again, correct me immediately because it's a rarity these days post pandemic that I have plaintiffs and defendants in a civil case in the courtroom, and in the criminal cases, most instances are pleas or hearings and the defendant who is typically confined is sitting where you are sitting. So in my head, I think defendant as opposed to plaintiff because as we know customarily, the plaintiff always sits closest to the jury box. So correct me if I get that confused again.

MR. CAMPBELL: Sure. Will do.

THE COURT: Go ahead.

MR. CAMPBELL: So to return to the OMB documents that were published yesterday, now these are not referred to in our

reply brief because we didn't notice them until after we filed the reply brief yesterday, but they are on OMB's website, they are a matter of public record. It reveals a number of very interesting things about the program. The first one that I would highlight is that those documents show that you either have to have the requisite income being low enough in 2020 or in 2021, in one of the two years. So what that makes clear is that someone who is in a household earning, say, $240,000 a year in 2020 and then they got a massive promotion at work and now they are earning roughly a million dollars a year in 2021 and roughly 2 million dollars a year in 2022, that person is eligible for this cancellation. That more so than perhaps some other things we have said so far in the case highlights the arbitrariness of what the Agency is doing.

There is another interesting thing in those administrative documents. One of the things that the defendants rely on in defending the massive scope of this program is they point to the need for administrative convenience. They say that they can't engage in many particularized inquiries, so they need administrative convenience across the board. But what the OMB papers show is that they estimate that approximately 30 million people are going to need to file applications, and more so, that up to 5 million people are going to have to go through a detailed income verification process. All of that, of course, is

requiring at least some measure of individualized inquiry. So I think that undermines a lot of what the defendants are saying about the need for administrative convenience.

And so I have talked about what we have learned through the memo, the Rationale Memo, filed on Friday. I've talked about what we've learned through the OMB papers published yesterday, and who knows what we'll find out tomorrow, but with every increasing step, more and more is showing that the defendants are violating the law, particularly the APA. So the way I would characterize what's going on, Your Honor, is that the federal government is engaged in a so far hidden, ever-changing, and increasingly crumbling escapade of lawlessness. Everything we learn more about the program shows that the Department is making this up as they go, they are acting without Agency authority, and they are flouting the HEROES Act, which doesn't give them the broad authority they claim.

Now, when the Court looks at the merits of our claims, we have essentially three of them. There are two APA claims. The first is exceeding statutory authority and in violation of the Constitution, the second APA claim is arbitrary and capriciousness, and the third claim is the direct constitutional ultra vires separation of powers claim we've raised.

The first question to ask when deciding that first

question, whether they are acting in excess of their statutory authority, is whether the Major Questions Doctrine applies. The Major Questions Doctrine was recently addressed by the U.S. Supreme Court just in June in the case of *West Virginia versus EPA*, and what the Court acknowledged there is that Courts must presume that Congress does not intend to silently or ambiguously delegate to agencies the power to make decisions of great economic and political significance, but that's exactly what the defendants are trying to do here, to make a decision and make an action of great economic and political significance; therefore, it calls for Courts to presume that Congress didn't give them that power.

Now, there are four factors that we highlight and that the defendants don't even really contest that show the Major Questions Doctrine applies here. The first is what I just mentioned, which is, is this an action of major economic and political significance. They admit that point on page 30 of their brief. Second point is that this cancellation seeks to achieve an outcome that Congress has conspicuously and repeatedly rejected. They don't deny that point. Third, this cancellation is an unprecedented use of the HEROES Act. They don't deny this either. They never cite any instance where the HEROES Act has been used to eliminate debt yet alone to do it on such a vast scale. Now, in fairness, they do argue that the Secretary has some power to eliminate debt, but they cite

to other provisions in the Higher Education Act. They don't cite to the HEROES Act as an example of a situation where they have ever forgiven debt before.

And the last factor showing that the Major Questions Doctrine applies is the sheer scope of defendants' claim to authority under the HEROES Act. They take a statute that focuses on providing relief for particular groups adversely affected by a national emergency, and they transform it into a tool for canceling hundreds of billions of dollars in student loan debt for borrowers worldwide and -- and I think this is key -- they indicate in their Rationale Memo -- this is at document 27-1 at 14 -- they indicate that they could discharge all borrower's entire loan amounts if necessary to mitigate a risk they perceive to delinquency and default rates rising. So what they have asserted is an extravagant claim of authority, and for that reason, the Major Questions Doctrine applies.

That then takes us to the question of whether they can prove clear congressional authorization for what they have done, and, Your Honor, this they can't do either. I would highlight three ways in which they are acting beyond the statutory text. The first way is that the HEROES Act requires that the relief afforded must be, quote, necessary to ensure, end quote. They included "borrowers won't fall into a worse position in relation to their loans." But the defendants

clearly do not comply with this, and you can illustrate it through a number of examples, but I will give you one. Consider a borrower who continues to owe $10,000 on their loans and they live in a household that makes $240,000 a year. That person is -- they have not shown that forgiving that person's remaining $10,000 is necessary to ensure that someone in a household making almost a quarter million dollars needs that to avoid falling into a worse situation.

The second way in which they flout the HEROES Act is that it requires that the affected individuals included in the program must be at risk of facing a worse financial position in relation to their loan, but again they can't comply with this either. They don't even come close to designing a program that complies with that. Another example, if the program had someone who at the beginning of the pandemic was in a household earning a hundred thousand dollars a year and now that household income has grown to $200,000 a year, they cannot show that that household -- everyone in a household like that is in a position where they are at risk of facing worse outcomes regarding their loans. In fact, there is no way they are facing worse outcomes concerning their loans particularly in light of the ongoing forbearance.

And the last point that I would highlight is the HEROES Act limits the Secretary's power to helping borrowers who face financial risks because of the national emergency;

the key words being "because of." But they are trying to invoke this power two and a half years after the pandemic started and just as the President said that the pandemic is over, and they are trying to do it as the pandemic is exiting. They simply don't have power that broad under the HEROES Act, and they are reading the phrase "because of" too broadly.

So that, Your Honor, is in a nutshell why the defendants are acting in excess of their statutory authority and why they are violating the Constitution by infringing the Separation of Powers Doctrine.

That brings me to the arbitrary and capriciousness claim, which we have briefed a lot of that. I will just hit a few points to highlight it. Your Honor, I mentioned at the outset -- or I mentioned earlier about the fact that their Rationale Memo shows that they haven't considered any reasonable alternatives. That shows the arbitrary capriciousness of their actions. Next, they fail to consider important aspects of the Act. So one of the requirements of the Act is that the Secretary's power is limited to providing relief to affected individuals. Affected individuals is a component, a key component, of the statute, but in the Rationale Memo, the Agency never even recognizes that requirement of the statute, and that failure to do so is again a Hallmark of arbitrary and capricious action.

Another point on arbitrary and capriciousness, there

is nothing in the Rationale Memo that even attempts to justify the $250,000 household income cut-off. Nothing. There is not a single mention trying to justify that. That, too, highlights the arbitrariness of the action. The defendants neither did they consider any reliance interests. They didn't even consider whether reliance interests were present. We are dealing here with a massive student loan market, and this is a significant shock wave to it, and they didn't even take the time to consider whether there were entities out there such as plaintiff states who have reasonable reliance interests at stake. That, too, is arbitrary and capricious under the Board of Regents case.

And the last point -- and, Your Honor, I only have a few minutes left. The last point I would make on the arbitrary and capricious argument is I think something particularly key, and that is this September 29th change that the defendants tried to do. That's when they tried to take this consolidation pathway, the FFEL loan consolidation pathway, and to close it. Again, we argue that that's an unauthorized change and that it's illegitimate and that the pathway is still open, but even if it did close the pathway, all it did was create two classes of borrowers that are entirely arbitrarily divided. So now you have borrowers with non-federally held FFEL loans who if they applied to consolidate before September 29th, they are eligible, but if

they did not apply to consolidate before that date, they are supposedly not eligible. There is no basis for that in any of the Agency documents. They don't ever try to explain that distinction. They don't ever try to justify that distinction.

And I think it's important to note that by the defendants doing something, they have done something very interesting there. They purport to continue to recognize the consolidations that started prior to September 29th, and in doing so, they recognized that consolidated loans do, in fact, fall under this program. So what that does is simply highlight the fact that they didn't have authority to try to close that pathway in the first point because all of the consolidation loans because they become direct loans are included in the waiver that -- or in the authorization of the waiver that came from the Secretary.

Your Honor, we also -- that's all I have on the APA claim. We also have our ultra vires separation of powers claim. The defendants seem to acknowledge that we can bring that claim procedurally, we can bring an equitable cause of action, and they say that if we have an APA claim, that we might not be able to bring it then, but all that to say that that claim is on the table and we should prevail on that claim for the same reasons I articulated why the defendants have acted in excess of their statutory authority.

So the only thing that brings the Court left to

consider in terms of the factors for injunctive relief is the last two factors. We have talked about standing and irreparable harm. We have talked about the likelihood of success on the merits, and that leaves the last two factors, public interest and balance of harms. The balance tips sharply in plaintiffs' favor for two reasons: First, plaintiffs face substantial irreparable harm as I discussed before. There is significant sums of money at stake here, and because of sovereign immunity that the federal government has, the plaintiffs can't recover those funds on the back end. And the second reason is that borrowers are already protected by the ongoing forbearance. So when you weigh the balance, the balance comes out in favor of the plaintiffs.

And as to public interest, the most critical factor is that, as Courts have said time and time again, there is no public interest in perpetuating unlawful agency action. Indeed, the Supreme Court just said in *Alabama Association of Realtors*, our system does not permit agencies to act unlawfully even in the pursuit of desirable ends.

So for all these reasons, we ask the Court to enter a preliminary injunction that enjoins the defendants from further implementing or enforcing the cancellation and that also enjoins the Secretary from officially publishing the waiver in the Federal Register. Your Honor, we ask for a prompt ruling on this because the Agency is moving very

quickly to put this in place, and as I have indicated before, once the cancellation goes into effect, a lot of things cannot be turned back.

The last point that the defendants make is that the injunction should be constrained. They say that if we do get an injunction, it should be confined to particular states or in some other way. Your Honor, we firmly oppose that argument for a couple different reasons. The first is that the APA's directive to set aside unlawful agency action contemplates national relief within its scope. That's what setting aside does. If you set it aside, it no longer exists and, therefore, it has national impact. The second reason is that placing a geographical limitation on the injunction will not afford complete relief to the plaintiffs, and I will use Missouri and MOHELA as an example of that. As I mentioned -- well, I didn't mention before, but the facts in our brief make clear that MOHELA services accounts for borrowers all throughout the country, so you can't -- so confining the injunction to just a particular state simply won't work.

On the other hand, the defendants seem to imply that maybe you could put an injunction in place that only applies to loans serviced by MOHELA, but that wouldn't work either because the federal government has approximately nine servicers of federal loans, so what they could then do is just transfer all the MOHELA accounts that are eligible for a

discharge to some other servicer and go directly around the injunction on that basis.

So we would ask the Court for the injunction that simply enjoins further implementation and enforcement of the program and that directs the Secretary not to publish the waiver. That's all I have, Your Honor.

THE COURT: Thank you. Mr. Netter. Proceed.

MR. NETTER: Thank you, Your Honor. May it please the Court. With the Court's permission, I would start with some brief table setting before moving on to the standing and merits points. More than 50 years ago, Congress adopted the Higher Education Act which created a robust system of federal financial aid that has helped untold millions of Americans to access opportunities for post secondary education. Then and now, Congress vested the Secretary of Education with broad authority to administer the student loan program, including a general power to compromise, waive, or release any claim held by the Department. On top of that general authority, nearly 20 years ago, Congress saw fit to grant additional special powers to the Secretary of Education to respond to wars and national emergencies. Under the HEROES Act, the Secretary of Education has the authority to waive or modify any aspect of the student loan program as he or she deems necessary to prevent individuals who are affected by the national emergency from experiencing an adverse economic effect in respect to

their student loans.

Under the HEROES Act, a larger economic effect unlocks a proportionately larger response. It is the very design of the statute for the magnitude of available relief to rise and fall with the magnitude of the national emergency. When COVID-19 was declared a national emergency on March 18, 2020, it was immediately apparent that the pandemic would have wide ranging economic effects, and that is why just two days later, then Secretary of Education Betsy DeVos invoked her authority under the HEROES Act to relieve borrowers with eligible loans of their obligations to make their periodic loan payments and reset their interest rates to zero percent.

Just as the prior Administration provided student loan relief that it deemed necessary to protect borrowers from adverse economic consequences stemming from the early days of the pandemic, the incumbent Administration has done the same, undertaking the analysis to determine how to protect borrowers from ending up worse off economically in relation to their student loans because of the national emergency.

Now, as the Court knows, the six plaintiff states here filed this action to prevent that relief from going out. Their lawsuit we believe to be misguided, and the relief that they seek is unavailable, both because they lack standing and because their claims on the merit are unavailing.

Now, I will move quickly to the threshold standing

points and then a discussion of the merits, but I did want to start first with a timing point because I know that when Courts are asked to enter emergency relief, that timing considerations can be of foremost importance. When the case was first filed, we were able to represent to the Court that there would be no issuance of student debt relief prior to October 17th based on a number of prefatory steps that need to take place beforehand. In our opposition brief that we filed on Friday, we were able to represent that no loan forgiveness will be issued prior to October 23rd, which we expect will provide the Court with some additional time to resolve the matter at hand compared to the schedule that was originally devised.

And with that, we can move on to --

THE COURT: Can I get another law clerk? Judge humor. Go ahead.

MR. NETTER: Your Honor, being unable to grant that request, I will move on to a discussion of standing. And as the Court indicated, the first question here is whether there is standing as to the President of the United States or whether the President of the United States is a proper defendant for reasons that include and expand beyond standing, and we think the answer to that question is an easy no. The plaintiff states have acknowledged that they do not have standing, do not have authority to sue the President under the

APA. The president doesn't constitute an agency. In any event, their only claims here are for prospective relief in the nature of an injunction. Courts don't have the authority to enjoin the President of the United States and Courts have not exercised authority to issue declaratory judgments against the United States. So even if the President had a policy-making role here beyond announcing what the Department of Education had determined, the President is not a proper defendant in this case.

With respect to the remaining defendants, the plaintiffs have identified three categories, which they actually describe as four categories, of reasons why they say that there is standing. First, the incentive to consolidate they say results in injuries for their FFEL loan portfolios and FFEL relationships; second injury is associated with MOHELA's role as a servicer of direct loans; and third, tax consequences stemming from the debt forgiveness. So let's start with the injuries supposedly stemming from the incentive to consolidate.

THE COURT: Let's back up for a moment. On the standing issue, at what point did the Secretary -- did the Department announce that they were going to engage in loan cancellation?

MR. NETTER: So, Your Honor, we think that the formal act that sets into motion and authorizes the forgiveness is

actually the publication today in the Federal Register of the notice which the plaintiffs asked to have enjoined, which obviously can't be enjoined because it has already happened, but the formal notice of the invocation of HEROES that was made available yesterday by the Federal Register for public inspection and appears in today's issue of the Federal Register.

THE COURT: So then the formal announcement was today from the Department, Secretary, and the President announced in August; correct?

MR. NETTER: Yes, Your Honor.

THE COURT: An order I believe, correct me if I'm wrong, regarding loan forgiveness, correct, in summary?

MR. NETTER: So, Your Honor, the actions here, the decisions, are made by the Secretary of Education and by his subordinates.

THE COURT: Not my question. I am talking about the President right now, okay? Did or did not the President make an announcement in August that there was going to be loan forgiveness?

MR. NETTER: Yes. So alongside -- along the same timeline as the Secretary of Education was reviewing the papers that we have filed in the record here, the President did announce that the Department of Education would be proceeding along a path of invoking the HEROES Act. That's

true, Your Honor.

THE COURT: And then the Department, the Secretary, so announced; right?

MR. NETTER: Yes, Your Honor.

THE COURT: Okay. Go ahead.

MR. NETTER: Okay. So I think that takes us to the injuries supposedly stemming from the incentive to consolidate, and the theory there is the plaintiff states believe that they are better off if the indebtedness that resides within privately-held FFEL loans stays there. But it's important to recognize that the claims that the plaintiffs made here are all prospective in nature. They want a forward-looking injunction to prevent future actions that the Department of Education might undertake, and there is nothing that the Court can do prospectively to remedy those supposed injuries stemming from FFEL consolidation because as the plaintiff states discussed, the Department of Education announced -- and today's notice in the Federal Register establishes -- that only FFEL consolidations that were applied for prior to September 29th are eligible for the loan forgiveness.

Now, I was surprised to see the arguments in yesterday's reply brief, the states arguing that the September 29th cut-off date is somehow unlawful and should not be considered by a Court because the injury that the plaintiff

states have come before the Court to assert with respect to consolidation is an injury that is resolved by that cut-off date. Now, they have taken the position that they were surprised by the announcement of the cut-off date. I would refer the Court, of course, to the decision memo which indicates that although the Secretary -- let me get you the right page number here. Although the Secretary was -- oh, there it is. This is docket 27-1, page 1. "The paper that was presented to the Secretary is not an exhaustive list of all the decisions required to operationalize a pandemic-connected loan discharge program nor is it a complete inventory of all pieces of supporting evidence that the Department considered." And this is in part the peril of filing a lawsuit based on press statements before the policy details have all come out here.

We don't think that the plaintiff states can revive their standing by asserting that an action that I would think that they acknowledge removes their injury with respect to this incentive to consolidate ought to be subject to challenge by somebody else. They don't assert the authority to challenge the September 29th cut-off date themselves. We don't believe that any such challenge would have merit because the operating facts, the considerations driving the invocation of HEROES here, pertain to the emergence from the payment pause, a payment pause that did not apply to individuals with

privately-held FFEL loans in conjunction with a need to create a program that was operationally effective. So plaintiffs we don't believe have any authority to assert that concern nor would it succeed if they could.

Moreover, the plaintiffs now assert that their harms would still exist because it would be possible for the Court to order consolidations that are in progress to be cancelled such that the possibility of them losing certain accounts would be somehow mitigated. But let me note in that respect that the right of FFEL borrowers to consolidate to a direct federal loan in some circumstances is a preexisting authority that was not part of the invocation of HEROES here, and that appears at 34 CFR 685.220. The states don't offer any authority or any justification for why the action of individual borrowers who have FFEL loans who seek to consolidate into direct loans, you know, why that's impermissible in the ordinary course, why it should be impermissible here, why a Court would have any authority to enjoin those actions. None of that is part of the complaint here. As a result, we don't see any harms that do still exist as a result of the prospect that there would be an incentive to consolidate moving forward.

Now, I think it's worth noting also that the vast majority of student debt in this country is not privately held. More than 90 percent of that student debt is held by

the Department. So the FFEL loans that are within the separate box that are privately held and those that pertain to the plaintiff states here are a very small percentage of this program, and we don't have any evidence from the plaintiffs here as to the nature of the projected impact of this supposed incentive to consolidate as the program currently exists.

Now, the plaintiff states said that there is some sort of a voluntary cessation argument that they want to make, and there is an exception to the Mootness Doctrine for voluntary cessation by a defendant, but this is not a mootness situation. You can only -- a case can only become moot if there was standing when the case was filed, and here the Department had already decided on the contours of the program before the lawsuit was filed, had already set the September 29th eligibility cut-off, and there is no prospect of just the website being changed again as the plaintiff states indicated because the official declaration of the HEROES Act, which was published in today's Federal Register, establishes that September 29th cut-off. So were there to be some separate relief that were available to FFEL loan holders, it would have to be an entirely separate action that wouldn't properly be considered alongside this one.

I would note although it didn't come up today that the plaintiff states in their briefs also identified some quasi sovereign injuries they called them, which basically

amount to the fact that some states invest in FFEL loan portfolios and use the proceeds of those investments to invest in other priorities, such as higher education more broadly. We put those in the first bucket here because those are essentially a part of the same injury. The only injury to the investments associated with FFEL loans would be if the FFEL loans could be -- if there was the incentive to consolidate those to direct loans. So if there is no forward-looking incentive to consolidate, there is no hit on these FFEL portfolios and no effect on the pension funds that some of the plaintiff states were complaining about.

THE COURT: So is that the same to say or if you are saying, maybe I am misunderstanding, but are you saying that those investments, well, just could turn out to be bad investments and not the consequence of any direct activity on behalf of the Department/federal government?

MR. NETTER: So we are saying that, but we are also saying more. So it's certainly the case that the prospects of investments rise or fall for any number of different reasons that have to do with, you know, macro economic circumstances and actions by independent third parties. But here --

THE COURT: Pandemics.

MR. NETTER: Pandemics, exactly. Here, however, the supposed injuries that the states are asserting is that the FFEL portfolios will become smaller and they will generate

smaller amounts of interest which will then reduce the bond yields on bonds that are funded by these FFEL loans because there will be this Incentive to Consolidate Act, and that incentive doesn't exist, so the chain of causation that the plaintiff states have identified just doesn't work, and even if it did, this is a circumstance in which because the statute allows consolidation under any circumstances and because the Department of Education does not make promises that the programs are going to remain a certain size at any point in time, I don't think there would be any injury there anyway, but there certainly isn't injury based on a theory of an incentive to consolidate given that the program as it has appeared in the Federal Register contains the cut-off date of September 29th.

I would move next, Your Honor, to the issues with MOHELA and its role as a federal contractor that services direct loans. There are at least three reasons why that claim to standing doesn't work. The first is that Missouri, which is the only plaintiff state with a relationship to MOHELA, Missouri hasn't established that it can sue for MOHELA's injuries. MOHELA as a matter of state law, sure, it is a creature of the State of Missouri, but it can sue and be sued and is financially self-sustaining. If and when MOHELA is sued, the state has disclaimed legal liability to pay the judgment. And we thought it was notable that in supplying

MOHELA documents to this Court -- and this is at ECF 5-1, Mr. Talent's declaration -- the states had to rely on the Missouri Sunshine Act in order to obtain documents. Now, in my experience, it's not the ordinary course that when you are representing the interest of a client, that you have to resort to FOIA or some sort of Sunshine Act in order to obtain information about that client to assert your own injury. So we think that there are plenty of indications here that if MOHELA has an injury, then perhaps MOHELA could be a plaintiff but that the State of Missouri has not established the predicates for asserting injuries that belong to MOHELA.

Even if MOHELA had filed this action, however, a lawsuit for injunctive relief in federal district court would be unavailable because any injury is really a function of the federal contract that MOHELA has entered into with the United States that would be subject to all of the rules and regulations that pertain to contract disputes in the Contract Dispute Act which channels certain suits to the Court of Federal Claims. And in this respect, I would refer the Court to two aspects, the two passages in the contracts that the states submitted as part of their initial motion:

The first, ECF 5-1, page 317, where the agreement says the government makes no guarantee to any contractor that their organization will retain their current loan servicing volume and the Government reserves the right to periodically

review and equitably adjust the rate structure to maintain effectiveness of the services provided; second, we have ECF 5-1 at 350 which specifies that the contract is subject to 41 U.S.C. Chapter 71, which is the Contract Disputes Act. "Failure of the parties to reach agreement on any request for equitable adjustment relating to this contract shall be a dispute to be resolved in accordance with the federal acquisition regulations, which is incorporated herein by reference. The contractor shall proceed diligently with performance of this contract pending final resolution of any dispute arising under the contract."

So the states say, well, we are not making a contract claim, we are making an APA claim. But for purposes of understanding the injury, we think there are only two outcomes here because all they are saying is that they are losing the proceeds of the contract, that they're not going to make as much money if these discharges go forward. Either their contract entitles them to greater compensation, in which case if they have a claim, they have to proceed through the CDA pathway and that would be the Court of Federal Claims, or particularly given that the Government has made no guarantee that they are going to retain their current volume and their claim is that they are losing a volume of contracts, they would have no contractual right to more payment, and if they have no right, they have no injury and no claim.

THE COURT: But isn't their claim really about not being able to maintain the stream of revenue because of the act of the Department in forgiving those loans? They can't sue for the obvious reason to recoup those funds, and for purposes of an injunction and irreparable harm, isn't that something where you have no adequate remedy at law and the harm that you are likely to suffer is not calculable in money damages, those two things? They may be calculable in money damages, but they have no remedy at law because they can't sue the government; right?

MR. NETTER: So I don't think that's right, Your Honor, and I want to draw a distinction between the injuries that they have asserted as the holder of assets who are entitled to interest or investment revenue from those assets and their role as the servicer, which is just an administrative provider of services under a federal contract. In the latter case, you know, they are doing the work. They are sending out statements. They are maintaining a website. And the contract says that there is this process for determining how much you are supposed to get paid, and that process, that payment, can be updated equitably, and there is a process for the service provider if it believes it is not being compensated appropriately to go to the Court of Federal Claims if it satisfies all the prerequisites.

So there is, in fact, a way if the plaintiff states

believe that they were promised to be paid a certain amount for the services that they were expecting to be performing and that, you know, they are no longer going to get paid that amount and it is inequitable for them to be paid less under the circumstances, well that's what these provisions of the contract I just read, that's what they dictate. That's the process that they create. Because at the end of the day, this is about the money that MOHELA is or is not going to be paid for its services as the servicer of direct loans that are held by the Department of Education. This is a contract dispute and the APA claim is secondary. The injury is a contractual injury for which there is a mechanism that they can pursue if they are really concerned about the amount that they are being compensated under their contract.

I would add also that we raise a zone of interest argument in our opposition brief because there seems to be a particular disconnect here as between a service provider who provides administrative services under a large federal program and the objectives of the HEROES Act, which is supposed to be providing relief to borrowers in times of a national crisis. It does not seem to us that the plaintiff states in the context of MOHELA as a service provider fall within the zone of interest of the HEROES Act and they, therefore, cannot raise an APA claim to assert their objection to the administrative action.

Now, one point that the states made in its reply brief last night was that they are injured because they use MOHELA's funds to generate revenue that they said today MOHELA can use for other purposes, and I just want to point that that doesn't speak to who the proper plaintiff is as between Missouri or MOHELA, and this seems, you know, to me very much parallel to a circumstance in which you have a parent corporation and a subsidiary. A parent corporation is always hoping that its subsidiary is going to be more profitable because the subsidiary can generate dividends and then those dividends can either be used for desirable purposes or they can be funneled up to the parent corporation itself, but that doesn't mean that a parent corporation can file suit whenever its subsidiary's revenues are reduced.

So I think, Your Honor, that brings us to the incidental effects on state tax revenue, and Mr. Campbell cited the *Wyoming* case as the supposed basis for the right of these states to have standing here because of the projection that they will lose tax revenue here, and I would respond with that assertion of a state with the assertion of another state, the case of *Pennsylvania*, *Pennsylvania versus New Jersey*. This is 426 U.S. 660. It's a 1976 decision of the U.S. Supreme Court. And let me read a short passage from that case. "The injuries to the plaintiffs' fiscs were self-inflicted resulting from decisions by their respective

state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No state can be heard to complain about damage inflicted by its own hand."

That's precisely what's happening here. The states have voluntarily determined for the time being that they are going to follow the federal definition of adjusted gross income for purposes of computing state tax liability. They are not required to do so. It is entirely possible for them to disaggregate their state tax system from the federal standard. Their decision not to do so amounts to a self-inflicted harm. And even the Fifth Circuit's decision in the Texas *DAPA* case, which was also mentioned by Mr. Campbell, that establishes the same proposition.

In distinguishing *Pennsylvania* from *Wyoming*, the Fifth Circuit acknowledged that *Pennsylvania* would govern if it were possible in that case to disassociate Texas law and federal law, which it did not believe on the facts of that case to be possible. Here because the only thing that these plaintiff states are doing is borrowing the federal definition of income and, therefore, incorporating the non-taxability through 2025 of student loan discharges, the states are entirely free to choose to tax these matters however they

please, and if they decide to stick with the federal standard, that's a self-inflicted injury that doesn't amount to a basis to maintain standing.

So unless the Court has any further questions on standing, I am happy to move on to the merits of this invocation of the HEROES Act.

THE COURT: Go right ahead.

MR. NETTER: So to begin with some basic principles, the Secretary of Education has authority to waive or modify statutory or regulatory requirements so that affected individuals aren't placed in a worse position financially in relation to their financial assistance because of their status as affected individuals. So the Secretary here has determined that there are provisions that can be waived or modified, particularly 20 U.S.C. 1087dd(c), which is the requirement that there be agreements to provide for the repayment of the principal amount. There are affected individuals here. The definition of affected individuals in 20 U.S.C. 1098ee covers any individual who resides or works in an emergency area. The national emergency for COVID covers all 50 states and all the permanently occupied U.S. territories.

So the focus that the plaintiffs have made with respect to affected individuals, they say, well, what about individuals who have been outside the United States and have not worked in the United States over the past two and a half

years who nevertheless have student loans that they would like to have discharged. There is another definition of affected individuals within 20 U.S.C. 1098ee, which is any individual who suffered direct economic hardship as a direct result of a national emergency as determined by the Secretary, an indication that Congress was intending to grant discretion to the Secretary to determine when that condition was established. It does seem hard to believe that there are many individuals out there who haven't been affected directly by the pandemic, either the pandemic as it has manifested in the United States or more broadly.

In any event, the HEROES Act also makes clear that because this is a statute that's supposed to be administered in a case of national emergencies, that there doesn't need to be case-by-case evaluation. The statute itself says that you don't have to do a case-by-case assessment, which is not something that is frequently baked into statutes authorizing administrative relief. Moreover, the operative standard here is not that there is a limitation on anybody who is not an affected individual benefiting from the relief program; it's that the Secretary is authorized to provide such relief to ensure that affected individuals are not placed in a worse position financially in relation to their financial assistance, and that ultimately is an empirical question for which the Secretary has reviewed substantial data which we

summarize in our brief and is contained also in some of the exhibits thereto.

I would flag a couple of these sources of data here; first, survey data demonstrating that borrowers are considerably less able to keep up with loan payments now compared to pre-pandemic, supporting the inference that there remain economic effects that have not been resolved. There is data from the CFPB demonstrating that delinquencies of non-student loan debt by student loan borrowers have returned to pre-pandemic levels even though those individuals aren't currently paying down the debt on their student loans, and that supports the inference that if and when additional debt burdens are added, delinquencies will rapidly exceed pre-pandemic levels.

The Secretary also considered historical evidence stemming from other payment pauses, for example, in the case of hurricanes or wild fires. And in recent circumstances in which payments were paused because of national emergencies, the default rates skyrocketed when the payment pause ended, rising from 0.3 percent to 6.5 percent. That's a 21-fold increase. The Decision Memo also considered the sensitivity of payment rates to borrower income, the relationship between Pell eligibility, family wealth, and delinquency rates, and the historical evidence as to how much principal reduction is needed to meaningfully reduce default risks.

Now, I want to get into the specific challenges that the plaintiff states have raised here, but first it's important to pause on the legal standard. Again, this is an emergency statute. This is a statute designed to work in emergency situations. And as I mentioned before, Secretary DeVos invoked the HEROES Act just two days after then President Trump declared the Coronavirus pandemic, and that ought to be informative of the sort of analysis that Congress anticipated and the sort of review that is warranted by a federal court. Congress waived the procedural requirements of the APA providing specifically that there need not be case-by-case decision making and used expansive language to describe both the domain in which the Secretary would be permitted to operate and the authority of the Secretary to make decisions based on his assessment within that domain. And this is all because Congress was focused on providing pathways for relief in emergency contexts.

When there is a rule that is not subject to notice and comment rulemaking -- and nobody argues here that this rule should have been subjected to notice and comment rulemaking -- the APA standard needs to be informed by the overriding statute and its purposes, and it requires that there be a rational connection between the facts found and the choice made. Now, I want to emphasize that this is a highly deferential standard, made even more so given the emergency

nature of the proceedings and the need in this particular case to head-off harms that borrowers are set to experience in less than three months.

Now, the states focus first on the Major Questions Doctrine, and they say that this is a major question that should be subject to a different form of statutory analysis because the amounts of money at issue here are so large. We don't think that that is a correct understanding of the purpose of the Major Questions Doctrine. So at a higher level of abstraction, what's going on here? Administrative agencies have authority to operate because it has been delegated by Congress, and the Supreme Court in a very limited number of cases have said that sometimes when there is an unexpected use of a federal statute, it can't be presumed that Congress was actually delegating that authority in that context, such the Court should be more skeptical.

THE COURT: So then are you saying, Mr. Netter, that that means that an administrative agency has the authority to act within the parameters of the authority granted to them by Congress?

MR. NETTER: Yes, Your Honor. So it's crucial here that this is a statute about emergencies. It's a statute about national emergencies, and it seems hard to fathom that Congress wouldn't have understood at the time that a larger national emergency is going to prompt and necessitate a larger

action by the Secretary of Education. As a reference point here, the cost of the payment pause, which is not challenged by anybody --

THE COURT: So then how do we determine whether an administrative agency has been granted the authority to engage in a particular act that is being challenged?

MR. NETTER: Well, Your Honor, necessarily that's a function of looking at the statute and its underlying purposes, right? So the instances in which the Supreme Court has invoked the Major Questions Doctrine have been circumstances in which it believed there was a statutory backwater that nobody could have contemplated would be used in a --

THE COURT: So then how do you distinguish the *West Virginia* case, major question case, from this case?

MR. NETTER: I think that that -- what I was just starting to describe is precisely what the Court thought was happening in the *West Virginia* case, which was that there was this statutory backwater that had not been understood by many people over a long period of time to offer relief within that universe, and it had been reconceptualized to launch an administrative program. That's not what's happening here. There are large programs invoked under HEROES because the harms resulting from a national emergency are large. So the costs of foregoing payments, of freezing interest for two and

a half years on all the direct federal loans, that's a nine figure amount. That's $150 billion give or take, right? So the reference to, oh, well, this is a nine figure amount of determining to relinquish these debt obligations as the nation emerges from the pandemic, that's not shocking. That's just a function of the fact that there is a 1.6 trillion-dollar portfolio of student loans that's managed by the Secretary of Education. Congress legislated against the backdrop of that large portfolio, so saying that there is a lot of money at stake here is not really representative. It's not probative of the question of whether this was within the scope of what Congress authorized.

THE COURT: Well, but saying that there is a lot of money involved here and a lot of money at stake here, isn't that also quantifying not only the economic impact but the political impact as well? I mean, as I understand the states' argument, that is the crux of the argument as it relates to the major question issue. Isn't that right?

MR. NETTER: So there are certainly political questions that are in the ether here, but I don't think that the sorts of political questions that are discussed in the Major Questions Doctrine cases are what's going on here.

THE COURT: Okay.

MR. NETTER: I think there are always going to be policy decisions made by administrative agencies, and the

ordinary rule is that the political branches should be the ones to make political decisions and thereafter the people get a choice to elect their representatives and their president.

The plaintiff states cite some examples of legislation that was introduced that would have eliminated, you know, vastly larger amounts of student debt, and they said, okay, well, if Congress wasn't willing to do that, then, therefore, it shouldn't be willing to do this either and we should draw an inference, and we don't think that that's the right inference here, not least because the relief here is specifically tied to the national emergency, and also even with respect to the payment pause here, under the CARES Act, Congress required there to be a payment pause for portions of 2020, but both before that time and after that time, Secretary DeVos used her authority under the HEROES Act to initiate the payment pause and to extend it afterwards. So the fact that there may be some legislative activity in an area is not indicative of whether the preexisting authority -- and here the HEROES Act has been around for approximately 20 years -- whether that's sufficient to support the agency action.

THE COURT: Well, let me ask you this. Someplace, and correct me if I'm wrong, but I thought I reviewed in someplace in the documents that were filed either -- well, perhaps even by both parties that the economic fall-out in terms of dollars would be in excess of 1 trillion. Did I read

that someplace?

MR. NETTER: No, Your Honor. No.

THE COURT: Okay. Well, what would the economic fall-out be if all loans -- if loans were cancelled to the extent that the Secretary expects those loans to be cancelled, what is the anticipated economic fall-out?

MR. NETTER: So the numbers that I have seen are in the ballpark of $300 billion.

THE COURT: 300 billion?

MR. NETTER: Right, so of the same order of magnitude as the economic hit from the payment pause.

THE COURT: All right. I was a little off. $300 billion, it's a lot, but not really when you look at the overall debt of the nation, all right, and the budgets that Congress passes whenever they get around to passing them, okay? But it's still $300 billion, which is a nice chunk of money. So the $300 billion, does that not rise to the level of great economic impact? And, of course, as you said politically, there may necessarily always be some political policy issues concerned in any act, but looking at it from the standpoint of the *West Virginia* case at least as the first prong for consideration, the economic and political impact, doesn't $300 billion fall into that category?

MR. NETTER: So, Your Honor, I don't want to disagree that $300 billion is a large sum of money, but our

understanding of the test that the Supreme Court has laid out is that it's necessarily contextual. And here the objective of Congress was to provide a mechanism for supporting the economy and for supporting borrowers from the economic consequences of a national emergency, and in that context, it would seem to undermine Congress's objective and not to reinforce Congress's objective to require there to be legislation when an emergency is sufficiently broad, right? So if the notion of the HEROES Act is when there is a national emergency, the Secretary of Education should have the responsibility for making sure that individuals' student loans don't propel the national economy and the local economies when there are smaller national emergencies into disarray, then when there is a larger national emergency, you know, Congress's expectation one would think logically is that the authority of the Secretary should grow, not contract.

And the reason why the Major Questions Doctrine shouldn't apply here or certainly shouldn't apply to invalidate the action here is because the statute itself is contemplating the provision of authority that parallels the scope of a particular problem. It's cabined by the economic association, the economic consequences of a national emergency such that as the emergency grows, so does the authority of the Secretary. And it would be hard to dispute at this point two and a half years into the pandemic that there have been

substantial economic effects and that there continue to be substantial economic effects from the pandemic.

And perhaps that's a good opportunity to address the point that the states have made about the end of the pandemic, that this relief is being offered as part of the wind-down. Now, I certainly don't see any part of the statute that says that if there is a hurricane, you can only provide people relief while the hurricane is still spinning. In an ordinary context for a national emergency, something happens and people have to dig out from whatever that emergency was, and that's the concept of the statute here, that the effects have to have been caused by the national emergency or by a circumstance of war, and the relief has to be, you know, designed to remedy those harms. But the fact that the pandemic conditions are improving now seems neither here nor there especially given that the economic analysis that was before the Secretary of Education, you know, discussed specifically, you know, what the latent economic harms are that materialized when there is a payment pause that then expires. And there is real data on that. The 21-fold increase of delinquencies is a really striking figure, and given what the economic indicators are currently as demonstrated by the CFPB and the survey data, there is a real need for the relief that the Secretary determined he was going to provide under his authority under the HEROES Act.

So I think, Your Honor, that takes us to the APA claims where the dividing line between these claims are not entirely clear.

THE COURT: Sure.

MR. NETTER: But to address some other sundry points that the plaintiff states have made, they focus on the use of the word "necessary" in the statute because the HEROES Act does say that the Secretary has the authority to provide such relief as may be necessary to ensure that the statutory objectives are met. And I would refer the Court on this point to pages 22 and 23 of the opinion of the Office of Legal Counsel as to a contemplated exercise of the HEROES Act, and what that passage explains quite helpfully is that when Congress uses the word "necessary," depending on context, it can have a number of different meanings. And here, in context, what "necessary" means is appropriate or effective to accomplish those statutory ends.

And I would focus the Court's attention particularly on the words "to ensure that." Congress's objective or the text that Congress used in implementing its objectives under the HEROES Act were not to have a minimalist standard of cabining the Secretary's authority. The statutory text as a whole and specifically that clause that contains the word "necessary," it says "necessary to ensure", ensuring conveys breadth and given that none of this authority needed to be

exercised on a case-by-case basis. We also have past administrative practice that is consistent with the current exercise including the payment pause, which was not narrowly tailored in the way that the plaintiff states seem to suggest would have been necessary.

I would note also that the first waivers that were issued under the HEROES Act in 2003, they provided -- they had different rationales for different subsets of affected individuals but provided the relief to all the affected individuals as a group, whether or not the subset of rationales applied to them. Congress reauthorized the HEROES Act after that agency action, and usually in those circumstances, we view that statutory reauthorization as an endorsement of the approach to the administrative process. So we do not believe that there is merit to the argument that the Secretary misunderstood the word "necessary" in this context.

I also want to discuss the suggestion that, you know, perhaps the Secretary should have just continued the payment pause or, you know, done some other related task because that was the status quo under the *Regents* case. As a formal matter, we don't think that this is a circumstance in which a payment pause was the status quo because the payment pause was time limited. It expired of its own force. This was not a circumstance in which the agency had to pull down the payment pause in order to put something else up. Moreover, there is a

bit of a non sequitur here in the suggestion that the Secretary should have been considering a payment pause in lieu of providing the relief that is necessary to emerge from a payment pause, right, because if the alternative is not to emerge from the payment pause, well, the issue that the Secretary was considering is always going to emerge eventually, right? If you continue the payment pause for longer, there is still going to be a point in time where you are emerging from that payment pause.

Now, to be sure, the states have identified some other alternatives that they say perhaps the Secretary should have considered, but for that I think it's important to recognize and to remember that this is not a notice and comment process, that if this were the more formalized style of notice and comment rulemaking in which interested parties are able to, you know, offer alternatives and the agency is supposed to consider them and explain why it's adopting one reason or another, that's one form of rulemaking that was available to Congress, but Congress chose a different more expedited approach here, and it would be almost worse for an agency to have to predict all of the alternatives that the plaintiffs now say should have been considered here and a circumstance in which Congress has specifically disclaimed any obligation to undergo notice and comment rulemaking. The standard here is whether there is a rational connection

between the facts found and the relief that was accorded. Here, there was more than sufficient evidence that was before the Secretary and for which the Secretary deemed it appropriate to provide this relief to remedy the harms that he assessed to exist under the statutory standard that he was committed to apply.

And let me say briefly, Your Honor, that although the states had not terribly much to say about the ultra vires claims, we don't really think the Court needs to get into those claims at all because to the extent they're available and they ought not be available when there is an APA remedy in theory, there would be a higher standard such that, you know, all the reasons why the APA claims fail and why the Major Questions Doctrine arguments fail, those are sufficient to defeat the ultra vires claim which shouldn't exist in this context anyway.

So, Your Honor, speaking from a higher level of abstraction on these APA claims, the states have tried to identify some fringe cases. You know, they say because there was economic data about individuals making $125,000 a year and the Secretary exercises authority as to pairs, married couples, earning $250,000 a year, you know, what if there was somebody earning $240,000 a year, why isn't there specific evidence in that case to substantiate that award of relief, and that is the antithesis of what is contemplated by the

HEROES Act, which specifies that there need not be a case-by-case analysis. And one can only imagine what this program would look like, a program that is necessary to help the country emerge from the pandemic and to help resume the payment of student loans as of the end of this year, what that program would look like if it were necessary for the Department of Education to consider individualized circumstances in every case. Instead, the only way to administer a program of this magnitude is to set standards and not to have a narrow tailoring sense of overbreadth that is practically unavailable and is specifically not required under the terms of this statute.

So the states say that because of their injuries, this Court should exercise its equitable authority to enter preliminary injunctive relief to stop the partial discharges from going out and to maintain the indebtedness of those individuals -- not just those individuals who live in Nebraska and the other plaintiff states or those who have loans serviced by MOHELA, but for some reason for everybody. We don't think that makes any sense at all. It's not equitable to maintain debt that the Secretary of Education has determined needs to be forgiven to help the affected individuals emerge from the national emergency. We don't think that the scope of the emergency or the scope of the injury that the states have asserted is in any way parallel to

the benefits that will stem from the relief that the Secretary has deemed to be necessary, and we certainly don't think that an injunction of the breadth of what they are asking for is at all necessary to maintain the status quo even if they had established that they had a sufficient injury that needed to be protected based on a likelihood of success on the merits. None of those conditions are satisfied.

Instead, Your Honor, we ask the Court to deny the motion for preliminary injunctive relief. We also think at this juncture, it would be appropriate for the Court to obviously dismiss the President, who is not a proper defendant in this case, and because our standing arguments we believe to be meritorious, those would also be a sufficient basis for the case as a whole to be dismissed so that this exercise of emergency authority that was contemplated by the President and is implemented by the Secretary of Education can proceed.

THE COURT: So what is the status quo? What would the status quo be?

MR. NETTER: Well, the status quo right now as things stand is that the Department is undergoing the preliminary steps that are necessary to implement this program.

THE COURT: And so if an injunction were issued, the maintenance of the status quo would be what?

MR. NETTER: I mean, I think that's up to the plaintiffs to describe, but they say that they are injured

from --

THE COURT: Well, that's what I am saying. From the perspective of what you understand from what they have filed and what they have argued, what do you think that status quo would be?

MR. NETTER: Oh, I think that that status quo would be keeping people in debt, you know, not paying out the -- or not processing these discharge applications. But, you know, that creates in itself another harm. The reason that this program was crafted was so that these applications could be processed by the time that the payment pause is lifted so that the defaults and delinquencies that are feared and that the evidence suggests will occur, so that they can be averted. So on the other side of the scale here, there is a really substantial cost both to the individuals and to the objectives of the United States to any sort of pause here, and it's not warranted by the legal arguments that are before this Court.

THE COURT: So let me ask you this. The Higher Education Act gives the Secretary authority with respect to student loans; right?

MR. NETTER: Yes, Your Honor.

THE COURT: Okay. And under the Higher Education Act, the Secretary within his or her authority can forgive loans, cancel loans on a case-by-case basis; is that correct?

MR. NETTER: Yes, Your Honor.

THE COURT: And that's the Act from 1965?

MR. NETTER: Correct.

THE COURT: The HEROES Act, which the Secretary bases his authority now for this loan cancellation, is related to the Higher Education Act; right?

MR. NETTER: It is, Your Honor.

THE COURT: Okay. And the HEROES Act enacted in 2003 from a historical perspective was the result of wanting to provide -- Congress wanting to provide some relief to those who had student loans and may have been affected by the occurrences of 9/11, at least in part; right?

MR. NETTER: Yes, Your Honor.

THE COURT: Okay. Which gave the Secretary the ability to make certain decisions with regard to those loans to benefit those individuals; right?

MR. NETTER: We agree.

THE COURT: All right. And it talks about those in the military; right?

MR. NETTER: Indeed.

THE COURT: All right. And it talks about those in the military who might have been harmed as a result of certain military consequences; right?

MR. NETTER: Yes.

THE COURT: All right. And then it says, well, or national emergency; right?

MR. NETTER: Yes.

THE COURT: Okay. And so presumably since neither the plaintiffs or the defendants have really referenced it, those national emergencies are not limited to military activity. Would that be a fair statement?

MR. NETTER: Oh, absolutely, and historically they have not been so limited.

THE COURT: Uh-huh. And nobody's really talked about what a national emergency is. There is some brief reference in the documents but not really. So what is a national emergency and what is the basis for that conclusion? Is there any legislative history in relation to what Congress meant by a national emergency and does the statute itself, the HEROES Act from 2003 as made permanent in 2007, define what a national emergency is?

MR. NETTER: So, Your Honor, standing here I am not familiar with the legislative history of the definition of national emergency.

THE COURT: Well, you should be.

MR. NETTER: Except for the fact, Your Honor, that --

THE COURT: Because this is your case that you are defending, and legislative history is a necessary part of legislation. It just doesn't fall out of the air.

MR. NETTER: I understand that, Your Honor. There are statutes and historical precedents that permit the

President authority to declare national emergencies that then release certain emergency funds.

THE COURT: Yeah, we got that, but does the statute define what a national emergency is?

MR. NETTER: No, there is no definition of national emergency in 1098ee.

THE COURT: Does the statute define or declare what the Secretary can consider as to what a national emergency is?

MR. NETTER: No. There is no specific provision other than identifying there needs to be a national emergency at a national, state, or local level.

THE COURT: Okay. Thank you.

MR. NETTER: But as Your Honor indicates, you know, the existence of the HEA dating back to 1965, that's the backdrop against which Congress enacted the HEROES Act in 2003, so the suggestion that it was, you know, impossible to contemplate that the authority of the Secretary of Education which have long been understood to include the authority to release debts would have been somehow excluded from the authority of the HEROES Act is unsupported by history. And here with respect to the question of a national emergency, there is no dispute on either side of this case that President Trump's declaration of a national emergency which has been extended through the present date satisfies the statutory requirements here.

THE COURT: Thank you.

MR. NETTER: Thank you, Your Honor.

THE COURT: Anything further, Mr. Campbell?

MR. CAMPBELL: I'm sorry, Your Honor, I didn't ...

THE COURT: Anything else?

MR. CAMPBELL: May I have just a few minutes of a rebuttal? Should I keep it short or would the Court rather not hear anything further?

THE COURT: Define few minutes.

MR. CAMPBELL: I will keep those few minutes --

THE COURT: It's the lawyer in me.

MR. CAMPBELL: Yeah, fair enough. I will -- may I have five minutes?

THE COURT: Okay.

MR. CAMPBELL: I'm going to have to talk fast then.

THE COURT: You don't have to talk fast. You just have to talk pointedly, say more with fewer words, which is hard for us lawyers to do sometimes.

MR. CAMPBELL: It is. Thank you, Your Honor.

THE COURT: Go ahead.

MR. CAMPBELL: Just a few points. On the standing regarding the September 29th change, the key question whether it's standing or mootness -- that was an issue that was raised -- is when the change was publicly implemented. That didn't happen until September 29th after we filed the lawsuit.

They might have decided to make the change before and sent some internal emails about it, but it actually didn't happen until after, so this is a mootness question, not a standing question.

I want to talk about the harms to MOHELA. They allege that MOHELA -- that the harms aren't flowing to the State of Missouri, but that ignores the fact that in the statute creating MOHELA, it specifically says that it is a public instrumentality and it is charged with the essential public function of providing loans for students in the state and of supporting higher education institutions. So this absolutely does flow back to the state, and their attempt to insulate that is wrong.

They talk about the CDA, the Contract Disputes Act, but as we indicated in our reply brief, it does not apply to an APA challenge to a rule, a regulation, or other agency action like we have in this situation. And to highlight that point, this argument about the CDA, the Contract Disputes Act, has been raised by the federal government time and time again in all of their attempts to defend against the COVID-19 vaccine mandate on federal contractors, and as best we can tell, not a single judge has accepted that argument including Judge Noce here in this district.

They also --

THE COURT: So what happened with the case with Judge

Noce ultimately?

MR. CAMPBELL: The states prevailed, got a preliminary injunction.

THE COURT: Yes, I know that, but what happened to the case ultimately?

MR. CAMPBELL: It's pending appeal before the Eighth Circuit. It was argued just a few weeks ago.

THE COURT: Wasn't it argued in front of the Supreme Court also?

MR. CAMPBELL: Not that one, Your Honor. There was a different vaccine mandate case -- two different vaccine mandate cases that went to the Supreme Court.

The defendants also want to talk about the zone of interest test under the APA, and they say that MOHELA doesn't fall under that zone of interest, but that argument flatly fails because when you look at the HEROES Act itself, it says that the Secretary needs to consider the administrative requirements of administering the student loan program and the integrity of the student loan program. Who is more essential to that question than the servicers of the student loan, so they fall squarely within the zone of interest.

And then they mention -- the defendants mention that our tax harm is self-inflicted. It's not for the reasons we have explained in our reply brief, but even if it were, the Supreme Court in its recent *Cruz versus FEC* decision

specifically said, and I will quote, that even if an injury -- if an unlawful action is, quote, fairly traceable to such action, standing exists even if the injury could be described in some sense as willingly occurred. So that point simply doesn't hold.

Moving now to the merits, they talked about the statutory reauthorization of the HEROES Act and said that because that followed after the beginning of forbearance, that that tells us something about what Congress thinks. It maybe tells us something about what Congress thinks of forbearance, but it tells us nothing about what Congress thinks -- and I am not even sure that it does that because it was just such a rote administrative reauthorization, but it certainly tells us nothing about cancellation, the scope at issue here.

Defendants mention the Board of Regents case and they want to dismiss the fact that they failed to consider any alternatives because they say that this case doesn't involve notice and comment rulemaking. Well, neither did the Board of Regents case. That was a decision, an agency memo, issued by the head of that agency and it was outside of that process.

Lastly, the plaintiffs say that we rely on the fringe cases in showing that they simply haven't shown any authorization under the HEROES Act, but this isn't a case of fringe cases. This is an instance of a policy that gives mass debt cancellation to highly wealthy individual, people who are

in households earning just under a half million dollars a year. This isn't a fringe case. This is an issue where the federal government has simply not come close to justifying what it's doing under the statutory authorization they have.

Thank you for the extra time, Your Honor.

THE COURT: Thank you. Okay. Thank you, Counsel, for your appearance today. Thank you for your arguments. Thank you for answering my questions. Thank you for listening to my questions so that you could contemplate answering them. Erica, we'll show the matter as under submission, and you will hear from me soon. Okay. Thank you. We will be in recess.

(PROCEEDINGS CONCLUDED AT 12:30 P.M.)

CERTIFICATE

I, Angela K. Daley, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 78 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 14th day of October, 2022.

_____
/S/Angela K. Daley
Angela K. Daley, CSR, RMR, FCRR, CRR
Official Court Reporter